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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PIONEER FINISHING CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
AND KENNETH PACHECO et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. In striking the proper balance between the Board's jurisdiction to adjudicate unfair labor practices under Section 10(a) of the NLRA and the National Labor Policy to promote peaceful resolution of labor disputes through private arbitration under Section 203(d) of the LMRA, should the Board defer to the arbitration process so long as the arbitrator's award is not palpably wrong as a matter of law rather than subject such award to a de novo review?

2. Is the Court of Appeals' affirmance of the NLRB's failure to defer to arbitration in reliance upon the Board's change in its deferral policy announced in Suburban Motor Freight, 247 NLRB No. 2, but subsequently not followed limiting deferrals to unfair labor practice issues that were both presented to and considered by the arbitrator contrary to a proper accommodation of the "dual National Labor Policy" of deferral to arbitration and the prevention of unfair labor practices?

3. Did the NLRB fail to properly accommodate the "dual National Labor Policy" when it refused to defer to an arbitration decision where the dispute was voluntarily submitted to binding arbitration, the proceedings were fair and regular, the arbitrator received and considered the same evidence which the Board would consider in a de novo consideration of the unfair labor practice issue, and where the arbitrator's factual findings supported the conclusion that the complained of conduct was arguably permissible under the NLRA?

4. When a Court of Appeals scrutinizes application of the NLRB deferral to arbitration policy, what standard of review should it apply: abuse of discretion or legal error?

5. Where the decision of the arbitrator is susceptible of two interpretations -- one permissible and the other impermissible under the Act -- can the Board or the reviewing court properly find that decision to be "clearly repugnant to the Act?"

6. Where an employee has circulated a leaflet containing statements damaging to the employer, which the arbitrator found the employee knew to be false and misleading, and the arbitrator found such conduct to be unprotected, is the Board or the reviewing court free to disregard the arbitrator's decision?

* * *

Rule 28.1 Certification

Pioneer Finishing Corporation is a wholly owned subsidiary of Nortek, Inc., located at 815 Reservoir Avenue, Cranston, Rhode Island 02910.

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PETITION FOR A WRIT OF CERTIORARI
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_____

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit enforcing the order of the National Labor Relations Board ("Board") is reported at 667 F.2d 199, 109 LRRM 2112 (1981) and is reproduced as Appendix A at pages A-1 to A-10 of the separately bound Appendix to the Petition for Certiorari. The Court's order denying the petition for rehearing appears as Appendix D at page A-114

of the Appendix.

The decision and order of the Board affirming the decision of the Administrative Law Judge is reported at 1299 NLRB No. 182 (1980) and is reproduced as Appendix B at pp. A-11 to A-19 of the Appendix, with the Decision and recommended Order of Administrative Law Judge Bernard Ries appearing at pp. A-20 to A-96 thereof. The Opinion and Award of Arbitrator Robert A. Browning is reproduced as Appendix C at pp. A-96 to A-113 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on November 23, 1981. Pioneer filed a timely Petition for Rehearing which was denied on December 23, 1981, Pet. App. at p. A-114. By Order dated March 19, 1982, Justice Brennan granted an extension of time within which to file this Petition for Certiorari to and including May 22, 1982, Pet. App. at p. A-115. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves §§ 8(a)(1), 8(a)(3) and 10(a) of the National Labor Relations Act, as amended, ("the Act"), 29 U.S.C. §§ 158(a)(1), 158(a)(3) and 160(a), and Section 203(d) of the Labor Management Relations Act of 1947, 29 U.S.C. § 173(d), which provide in pertinent part as follows:

> Section 8(a)(1): It shall be an unfair labor practice for an employer --
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization ...
>
> * * *
>
> Section 10(a): The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8 of this Act) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise ....

* * *

Section 203(d): Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application of interpretation of an existing collective bargaining agreement.

STATEMENT OF THE CASE

A. Background

The Company is engaged at its Fall River, Massachusetts facility in dyeing and finishing textile products. The Company has recognized for over 25 years the Amalgamated Clothing and Textile Workers Union of America ("Union") and its predecessors as the bargaining representative of its approximately 140 production and maintenance employees (Pet. App. A-22).

In 1977, the parties negotiated a new collective bargaining agreement, which agreement was ratified November 6, 1977. By its terms, the agreement entered into November 4, 1977 was in full force and effect until November 5, 1980. Kenneth Pacheco (herein "Pacheco") was a member of the Union's negotiating committee (A-22).

B. The Discharge of Pacheco

Pacheco first became employed by the Company in 1973 and was elected shop chairman of the Company's plant in May of 1977, the top Union representative at the Company's facility (A-22).

In the spring of 1978, upon reviewing the draft of the 1977 through 1980 collective bargaining agreement prepared by the Company, Pacheco raised a question as to the omission in the draft of reference to a health and safety committee which, in Pacheco's view, had been agreed to in the collective bargaining negotiations. Pacheco brought the matter to the attention of Mr. Dufault, the Union's general manager[1]. The latter checked into the matter with the Union and Company negotiators. This inquiry satisfied Dufault that during the negotiations the parties had agreed only

[1] The general manager is the highest official of the local. Dufault had succeeded one John Martin, who held that position during the negotiation of the referenced collective bargaining agreement.

that such a committee would be tried on a temporary basis but would not be included in the collective bargaining agreement (Pet. App. A-23).

However, at Pacheco's urging Dufault scheduled a membership meeting for May 7, 1978 [2] in order for Pacheco to address the membership about the matter (Pet. App. A-23).

In late April or early May Pacheco met with two or three other employees and drafted a leaflet entitled "Fight for Safety Now ... Before It's Too Late." Pacheco reviewed and signed the leaflet as "the Shop Chairman"; his was the only name appearing on the leaflet. The leaflet stated inter alia that the Company "is a dangerous place to work"[3]; warned of "crippling

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[2] Unless otherwise indicated hereafter, all dates refer to 1978.

[3] The leaflet stated that there were 28 serious accidents resulting in 2,248 hours of lost time and wages in 1977 alone. The leaflet is reproduced in full at pp. A-92 to A-93 of the Appendix.

accidents" likely to befall employees in 1978 and urged employees to attend the Union meeting on May 7. (A-24 & 25; A-92 & 93).

On May 2, Pacheco entered the Company's premises at about 7 p.m., at which time he was not working or scheduled to be working, and distributed the leaflet throughout the plant to employees who were at work (A-24) [4] . At no time did Pacheco receive permission from any Company official to distribute the leaflets (A-108) [5] .

On May 5, Thomas Melucci, president of the Company, suspended Pacheco because of his conduct in distributing highly inflammatory and misleading information to employees in working areas in violation of the collective bargaining agreement. After

[4] Pacheco was assisted in the distribution by George Cummings, a union steward who was at work in the plant at the time (A-24).

[5] This is the finding of Arbitrator Browning. Administrative Law Judge Ries, based on his de novo review of the record, suggests without deciding that Pacheco received tacit approval from Company foreman David Queriem to continue distributing leaflets after already having passed out many (A-25).

further investigation, Melucci concluded that Pacheco had entered the plant without permission from anyone in management, that Pacheco had not attempted to verify the accuracy of the statements contained in his leaflet, and was of the view that Pacheco knew the facts to be false and misleading. On May 11, Pacheco was discharged (A-24 to A-30).

C. The Arbitration Proceedings

While the parties' agreement provided for a tripartite board of arbitration, in the interest of expediting the hearing the parties agreed to designate a single arbitrator. Accordingly, Robert A. Browning was selected by Pacheco to arbitrate his discharge, and his selection was agreed to by the Union and Company (A-52) [6].

[6] Browning has for a number of years been a staff mediator for the Massachusetts Board of Conciliation and Arbitration and in that capacity mediated and arbitrated labor disputes in both the public and private sectors (A-52).

The matter was heard on May 25 and the issue submitted was whether the Company was justified in discharging Kenneth Pacheco (A-96) [7] .

Based upon the testimony of the witnesses and the evidence presented at the arbitration hearing, the arbitrator concluded that Pacheco had neither requested nor been given permission to distribute the leaflet in the plant during working hours and that additionally he was not engaged in "protected activity." Accordingly, the arbitrator sustained the discharge (A-108 to A-113).

Arbitrator Browning observed that the issue to be decided is "whether Pacheco was engaged in 'protected activity' in writing and circulating the leaflet in the manner in which he did." (A-110 & A-111). He concluded that the following activities of Pacheco fell outside the pale of protection; drafting and

7 In addition to being represented by the Union, Pacheco was also represented by his private attorney (A-97).

distribution of a leaflet that grossly exaggerated, with an intent to mislead, the Company's safety record (A-108); unauthorized entry into the plant and distribution of a leaflet in violation of Article I and Article II (D) and (E) of the collective bargaining agreement (A-111 to A-112); and efforts to "change the course of collective bargaining" (A-110). The Arbitrator thus concluded that Pacheco's activities not only failed to constitute protected activity but in fact were in violation of the collective bargaining agreement (A-111 to A-112).

D. Proceeding Before The Board

On June 6, 1979, Administrative Law Judge Ries ("ALJ") found that the Company had violated Section 8(a)(1) and (3) of the Act by suspending and then discharging Pacheco. The ALJ rejected the Company's contention that the Board should defer to the Award of Arbitrator Browning. In this regard, the ALJ concluded:

> "Since I conclude that the disposition made by the arbitrator was not consistent with the determination the Board would make, I believe that deferral is not appropriate in this case." (A-55) [8].

On February 21, 1980, the Board affirmed the decision of the ALJ and ordered the Company to reinstate Pacheco and make him whole for any losses suffered as a result of his discharge.

E. Proceedings in the Court of Appeals

The Company petitioned the Court of Appeals for the First Circuit for review of the Board's Order. The Court of Appeals denied the Petition and granted enforcement of the Board's Order, finding inter alia that "in this instance, the Board did not abuse its discretion by deciding not to defer to the arbitrator's award" (A-7).

The Court of Appeals reasoned that the statutory issues implicated in Pacheco's discharge require "individualized analysis" and deference

[8] The ALJ also stated that the arbitrator's opinion did not convey an awareness of the statutory issues involved and, in the view of the ALJ, the arbitrator's decision abridged those priciples. The analysis of the ALJ was based on his de novo review of the record, rather than the facts as found by the arbitrator.

was inappropriate absent an indication that such analysis had been performed. The Court stated:

> It is not enough that the parties raised the statutory issues before the arbitrator and that one might decide that he considered those issues by virtue of the fact that he chose instead to rest his decision on contractual grounds. Where the arbitrator has no duty to consider the statutory issues, it would undermine the purpose of the Act to require the Board to defer merely on the speculation that he must have considered an employee's rights under the statute. (A-7).

The Court of Appeals then reviewed the evidence as found by the Board and concluded that substantial evidence on the record supported the Board's conclusion that Pacheco was discharged for the performance of protected activities in violation of the Act (A-10). Implicit in this finding, the Court of Appeals stated, was its judgment that the arbitrator's award was contrary to the purpose and policies of the Act.

REASONS FOR GRANTING THE WRIT

I. THE CONDITIONS ATTENDANT UPON THE BOARD"S POLICY OF DEFERRAL TO ARBITRATION AWARDS REPRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. FEDERAL LABOR POLICY PLACES CONSISTENT EMPHASIS UPON PROMOTING THE PEACEFUL SETTLEMENT OF LABOR DISPUTES THROUGH ARBITRATION

It has long been recognized that the fundamental intent of the National Labor Relations Act as amended is to minimize industrial strife and promote industrial stability through collective bargaining. This intent is furthered by the encouragement of collective bargaining agreements that require the submission of contractual disputes to final and binding arbitration between the parties. See John Wiley & Sons v. Livingston, 376 U.S. 543, 549 (1964); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960). Moreover, Section 203(d) of the Labor Management Relations Act of 1947 provides:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.
>
> 61 Stat. 154, 29 U.S. § 173(d)

In recognition of these principles, this Court in United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) stated:

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.
>
> Id. at 596.

In Boys Market, Inc. v. Retail Clerks, 398 U.S. 235, 252 (1970) this Court reiterated its approval of the arbitral process, characterizing it as "the central institution in the administration of collective bargaining contracts." Moreover, this Court has emphasized that "[T]he Board does not exist for the 'adjudication of private rights'; it acts in a public capacity to give effect to the declared public policy of the Act to

eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining." Phelps Dodge Corp. v. Labor Board, 313 U.S. 177 (1941).

In apparent recognition of this federal labor policy favoring arbitration, the Board, in Spielberg Manufacturing Co., 112 NLRB 1080 (1955), enunciated its criteria for arbitral deferral, stating that it would, as a matter of discretion, defer to an arbitration award if "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." Id. at 1082. This doctrine, as later elaborated by the Board in International Harvester Co., [9] 138 NLRB 923 (1962) was

[9] In International Harvester, the Board held that it would defer to an arbitrator's award "since it appears to us that the award is not palpably wrong". 138 NLRB at 929 (emphasis added). Subsequent thereto, the Board appeared to move away from the "palpably wrong" standard for determining repugnancy. See, e.g., Douglas Aircraft Co., 234 NLRB 578 (1978); Pincus Brothers, Inc., 237 NLRB 1063 (1978). Recently, the Board has

implicitly approved by this Court in Carey v. Westinghouse Corp., 375 U.S. 261, 270-272 (1964).

B. THE BOARD'S SHIFTING ARBITRAL DEFERRAL POLICY

In the nearly three decades following the Board's decision in Spielberg, the number and nature of the criteria applied to deference decisions have changed. In Raytheon Co., 140 NLRB 883 (1963), enforcement denied on other grounds, 326 F.2d 471 (1st Cir., 1964), the Board implicitly added a fourth criterion to the three set forth in Spielberg; the Board refused to defer to an arbitration award where "the arbitrator did not, and was advised that he could not, even consider evidence that protected concerted and union activities were possible causes for the discharges" that

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[9] Cont'd.
returned to this "palpably wrong" standard. G & H Products, Inc., 261 NLRB No. 47, 110 LRRM 1036 (April 23, 1982). The first of the Questions Presented in this Petition seeks a determination as to whether this "palpably wrong" standard re-embraced by the Board in G & H Products

had been the subject of the arbitration [10] . Id. at 886.

In Airco Industrial Gases, 195 NLRB 676 (1972), the Board extended its fourth criterion to cases in which the arbitration award simply "gives no indication that the arbitrator had not considered the statutory issue. The Board went a step further in Yourga Trucking, Inc., 197NLRB 928 (1972), holding that the

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[9] (Cont'd.)
should be applied in the case at bar rather than the de novo review applied by the Board. In the case at bar, the Board adopted the ALJ's conclusion that the arbitrator's awardwas "repugnant to the Act" because the disposition made by the arbitrator was not, in the ALJ's opinion, the determination the Board would have made. 247 NLRB at 1307. But, subsequently, in G & H Products, the Board held that the test of Spielberg "repugnancy" is not "whether the Board would have reached the same result, but whether the award is palpably wrong as a matter of law." G & H Products, Board Sl. Op. at 3.

[10] Several courts have interpreted this fourth requirement into an analysis of the "clearly repugnant" third requirement of Spielberg, holding that an arbitrator's failure to consider and rule on the statutory issue leads to a decision clearly repugnant to the Act. See, e.g., Bloom v. NLRB, 603 F.2d 1015 (D. C. Cir.

party seeking deference to an arbitrator's award bore the burden of "adduc[ing] proof regarding the scope of matters presented in the arbitration proceeding."

Two years later, the Board expressly overruled Airco and Yourga in Electronic Reproduction Service Corp., 213 NLRB 758 (1974). In that case, the Board asserted that henceforth it would assume that an award resolved statutory as well as contractual issues "except where unusual circumstances are shown which demonstrate that there were bona fide reasons, other than a desire on the part of one party to try the same set of facts before two forums, which caused the failure to introduce such evidence at the arbitration proceeding." Id. at 762 (foornote omitted). [11]

[10] (Cont'd)
(1979); Dreis & Krump Mfg. Co., Inc. v. NLRB, 544 F.2d 320 (7th Cir. 1976); Banyard v. NLRB, 505 F.2d 342 (D. C. Cir. 1974). In the instant case, the ALJ appears to intermesh the "repugnancy" factor with the fourth requirement added in Raytheon.

[11] Clearly, one such unusual circumstance would be where a party takes the position that the arbitrator can not consider evidence relating to the unfair labor practice issue such as in Raytheon.

In Kansas City Star Co., 236 NLRB 866 (1978), the Board deferred to an arbitrator's decision and dismissed a complaint even though the arbitrator made no specific finding that the complained-of conduct that was the subject of the arbitration proceeding constituted an unfair labor practice. The majority of the Board deferred to the arbitrator's decision, noting that the "issues contained in the complaint were presented, considered, and determined in the arbitration proceeding" Id. at 877. The majority also noted that where the arbitrator made factual findings vis-a-vis the contractual issues, it implicitly resulted in a consideration of the unfair labor practice issue. Consistent with this rationale, the Board, in Atlantic Steel Co., 245 NLRB 814 (1979), in deferring to an arbitration award, concluded that "it was necessary only that the arbitrator has considered all of the evidence relating to the unfair labor practice in reaching his or her decision" and that "the Spielberg doctrine could be satisfied where the arbitrator's decision

implicitly resolved the unfair labor practice." Id. at 315.

In 1980, the Board reversed itself once again in Suburban Motor Freight, 247 NLRB No. 2, 103 LRRM 1113 (1980), overruling Electronic Reproduction Service. The Board announced that "we will no longer honor the results of an arbitration proceeding under Spielberg unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator." 103 LRRM at 1114. Nevertheless, shortly after the decision in Suburban Motor Freight, the Board again reverted to the principle as set forth in Atlantic Steel Co. In Bay Shipbuilding Corp., 251 NLRB 809 (1980), the Board deferred to the arbitrator's award that the company's unilateral change of an insurance carrier did not constitute a breach of the collective bargaining agreement and dismissed the complaint, declining to determine whether the same action constituted a violation of the duty to bargain in good faith under the Act. In deference to the dissenting Board member who declined to defer because the arbitrator refused to pass on the

statutory issue, Member Penello observed:

> Nevertheless he [the arbitrator] made factual findings, in the course of resolving the contractual issue, which resolved the unfair labor practice issues. This is all that is necessary for deferral.

Id. at 810.

In his concurring opinion, Member Penello observed:

> A review of the decision shows that while it may be preferable for the arbitrator to pass on the unfair labor practice directly, the Board generally has not required that he or she do so. Rather, it is necessary only that the arbitrator has considered all of the evidence relevant to the unfair labor practice in reaching his or her decision.

Id. at 811.

As the foregoing review of cases demonstrates, the Board's standards for arbitral deferral have undergone many shifts and permutations in a relatively short period. As detailed below in Section II, these shifting Board deferral criteria have met with widely varying and conflicting fates in the Courts of Appeals. As a consequence of the ever shifting Board criteria and appellate disharmony, the arbitral deferral process breeds the very type of proliferating

litigation and labor relations instability the doctrine aims to avoid. Absent a definitive resolution of this issue by this Court, the intent of the Act to promote collective bargaining by encouraging parties to resort to contractual means for the peaceful resolution of industrial disputes will be fatally frustrated by permitting voluntary arbitration agreements to be avoided through multiple litigation of the same set of facts.

II. THE DECISION BELOW CONFLICTS WITH PERSUASIVE APPELLATE AUTHORITY, REFLECTING A GENERAL DISARRAY OF THE COURTS OF APPEALS ON THIS ISSUE, AND NECESSITATES A DEFINITIVE RESOLUTION BY THIS COURT

The affirmance by the First Circuit of the Board's refusal to defer to the arbitration is squarely at odds with a decision on point by the Third Circuit, NLRB v. Pincus Brothers, Inc., 620 F.2d 367 (3d Cir. 1980), denying enforcement of 241 NLRB 805 (1979) [12] . The employer in Pincus Brothers discharged an employee

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12 See also 237 NLRB 1063 (1978).

for distributing a leaflet which it believed to be defamatory and unprotected under the Act. The leaflet called a plant meeting a "circus," said the employer was instituting "pay cuts" to "our already stinking pay checks," that the shop "ain't no different from any other stinking garment 'shop in this city" and that the employer was making a "lousy style of clothes."

An arbitrator issued an award upholding the employee's discharge under the collective bargaining agreement. The arbitrator concluded that the discharge was for cause because in part the employee had intentionally misrepresented or distorted facts. The Board, on a motion for summary judgment, refused to defer to the arbitrator's award, concluding that it was repugnant to the purposes of the Act. The Board remanded the case to an Administrative Law Judge for a de novo review of the record, upon which the Board based its conclusion that the employer had violated the Act by discharging the employee who distributed the leaflet.

On appeal, the Third Circuit held that the Board's refusal to defer to the arbitration award was an abuse of discretion [13]. The Third Circuit held that the arbitration award finding the contents of the leaflet knowingly false rendered the leaflet unrpotected under the Act, stating:

> From the arbitrator's findings it appears at least arguable that Richardson's leaflet can be labeled as 'defamatory or insulting material known to be false,' Linn v. Plant Guard Workers, 383 U.S. 53, 61 (1966), and thus can be characterized as unprotected under the Act. [14]

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[13] In his concurring opinion, Judge Garth argued that the reviewing court should measure the Board's deferral decisions under a standard of legal error. 620 F.2d at 377. Under this view, the Board exhausted its discretion by adopting the Spielberg test, and application of that test to a particular case involves only nondiscretionary questions of law. Id. at 380-81. (See 4th Question Presented.)

[14] 620 F.2d at 376. The Third Circuit also found Richardson's actions arguably unprotected because (1) they constituted unprotected disloyalty; (2) because they were designed to interfere with the employer's long-established collective bargaining relationship with the union, citing Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975); and (3) because they were motivated by personal pique.

Consistent with its holding in Pincus Brothers, the Third Circuit, in NLRB v. General Warehouse Corp., 643 F.2d 965 (3d Cir. 1981), held that the Board was not required to defer to an arbitration award absent "some evidence" that the statutory issue has been decided. The Third Circuit distinguished Pincus Brothers because in that case both the arbitrator and Board treated the dismissal as precipitated by an employer's distribution of a leaflet, whereas in General Warehouse, the arbitrator made his decision without considering the employer's unlawful motives.

The conflict between the decision below and that of the Third Circut in Pincus Brothers is the clearest example of disarray among the courts of appeal on the subject of the Board's deferral to arbitration, but there is abundant other evidence as well. In Distillery Workers, Local 2 v. NLRB, 664 F.2d 318 (2d Cir. 1981), cert. den. May 17, 1982 (sub nom Liquor Salesmen's Union Local No. 2 v. Charmer Industries, et al. and NLRB, No. 81-1544), the Second Circuit held that

the Board abused its discretion in refusing to defer to an arbitration award even though the arbitrator had not addressed the unfair labor practice allegation of a refusal to bargain over a unilateral change in working conditions [15]. The Second Circuit reasoned that the arbitrator's findings of fact were "necessarily dispositive of the statutory issue" and, accordingly, the arbitrator "in substance" had "clearly decided the statutory issue [16]. Id. at 325.

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[15] In the Petition For a Writ of Certiorari, in No. 81-1544, in which the Court denied certiorari, the Union argues that the Second Circuit applied an inappropriate standard for considering the deferral issue and argues that the appropriate standard should be that which was formulated by the First Circuit in the case at bar.

[16] While the First Circuit in the instant case paid lip-service to the decision of the Second Circuit in Distillery Workers, it is readily apparent that the two decisions represent sharply conflicting views of the arbitral deferral criteria. Thus, as will be set forth in detail below, the factual findings of Arbitrator Browning are also "necessarily dispositive of the statutory issue."

Other courts of appeals have also reversed the Board's refusal to defer in circumstances similar to the present case. In NLRB v. Motor Convoy, Inc., 109 LRRM 3201 (March 24, 1982), denying enforcement of 252 NLRB No. 175 (1980), the Fourth Circuit held that the Board was required to defer to a joint arbitration committee award finding the employee's discharge was for just cause even though evidence relevant to the unfair labor practice allegation was not presented to the joint committee. The Fourth Circuit reasoned that the unfair labor practice issue was identical to the contractual issue because the collective bargaining agreement provided that employees could not be discharged for union activities. Accordingly, resolution of the "just cause" issue of necessity resolved the statutory issue. And the Ninth Circuit, in Douglas Aircraft Co. v. NLRB, 609 F.2d 352 (1979), held that the Board abused its discretion in refusing to defer to an ambiguous award, stating:

> The reasoning, if ambiguous, could have been interpreted in a non-repugnant way, and should have been in order to give arbitration the 'hospitable acceptance' necessary if 'complete effectuation of the Federal Policy is to be achieved.'

609 F.2d at 355, quoting from International Harvester Co., 138 NLRB 923, 927 (1962), aff'd sub. nom. Ramsey v. NLRB, 327 F.2d 784 (7th Cir. 1964).[17]

The First Circuit requirement that the arbitrator make an "individualized analysis" of the statutory issues finds support in the Seventh Circuit, wherein the court has held that an arbitrator's falure to "discuss thoroughly" the statutory issue precludes deference. St. Luke's Memorial Hospital, Inc. v. NLRB,

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[17] The Douglas Aircraft decision also recognized that "[i]f the reasoning believed an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award was 'clearly repugnant' to the Act." 609 F.2d at 354. Accord: Pincus Brothers, 620 F.2d at 374.

623 F.2d 1173, 1178 (7th Cir. 1980). In the Tenth Circuit, an arbitrator's award which "clearly ignores" Board and court precedent, warrants no deference. NLRB v. Gould, Inc., 638 F.2d 159, 166 (10th Cir. 1980), cert. den. sub. nom. Brown Boveri Electric, Inc. v. NLRB, 101 S. Ct. 3065 (1981).

III. THE ARBITRATOR"S FINDINGS OF FACT ARE NECESSARILY DISPOSITIVE OF THE STATUTORY ISSUE AND ARE NOT CLEARLY REPUGNANT TO THE ACT

A. DEFERRAL CRITERIA

The First Circuit's formalistic and rigid approach to arbitral deferral, requiring the arbitrator to engage in an "individualized analysis" of the statutory issues, can only serve to undermine the arbitral process and erode the industrial stability achieved under the Act. Indeed, the approach of the court below to arbitral deferral goes far beyond the test which the Board itself has established, i.e., that deferral simply requires that the arbitrator "make factual findings, in the course of resolving the contractual issue, which resolved the unfair labor practice issues." Bay Shipbuilding, supra, 251 NLRB at 811.

The court below patently failed to to give proper weight to the language of the Act and this Court's admonition that the Act's intent is furthered by the encouragement of collective bargaining agreements that require the submission of contractual disputes to final and binding arbitration betweenthe parties. John Wiley & Sons v. Livingston, supra; United Steelworkers of America v. Warrior & Gulf Navigation Co., supra. Rather than encouraging the parties' resort to voluntary arbitration as a means of settling industrial disputes, the decision below can only serve to undermine the arbitral process by encouraging multiple litigation of the same set of facts. Moreover, the "individualized analysis" requirement can only lead to minute and overzealous dissection of arbitration awards contrary to the approach required by this Court in United Steelworkers of America v. Enterprise Wheel & Car Corp., supra. As the Ninth Circuit recently noted in Douglas Aircraft Co.:

> Overzealous dissection of opinions by the NLRB, as well as by courts, can deter the writing of full opinions, and it should not be assumed that an arbitrator has snubbed the Act any more than he has exceeded his authority.

609 F.2d at 355.

B. THE DECISION BELOW MISCONCEIVES THE TEST OF PROTECTED ACTIVITY

The First Circuit compounds its misunderstanding of the role of arbitral deferral in furthering the purposes of the Act by misconceiving the nature of the statutory issue. Thus, the court below finds that the Board did not abuse its discretion in refusing to defer to the arbitration award because the "arbitrator's decision did not reflect, directly or indirectly, consideration of any factors germane to the statutory issue" and because "it would undermine the purpose of the Act to require the Board to defer merely on the speculation that he must have considered an employee's rights under the statute." Refusing to defer to the arbitration award, the court below then reviews the Board's decision on the merits under the substantial evidence

test. In so doing, the court below, and the Board in its de novo review of the evidence established at the unfair labor practice hearing, reviews the identical factors considered by the arbitrator in his opinion, the contents of the leaflet and the true facts on plant safety and accidents.

The statutory issue is whether the content of Pacheco's leaflet is protected under the Act. Springfield Library & Museum Association, 238 NLRB 1673 (1974). In Springfield Library, the Board expressly adopted the standard of Linn v. United Plant Guard Workers of America, Local 114, 383 U. S. 53 (1966) in determining whether the content of a leaflet is protected under the Act. Under these standards, a communication will lose its protection under the Act if published with knowledge of its falsity or with reckless disregard as to its truth or falsity. As stated by this Court in Linn, Board doctrine holds that the Act does not give parties "license to injure the other intentionally by circulating defamatory or insulting material known to be false" and

one who does so loses the protection of the Act. Under these standards, one must look to the content of the communication and knowledge and/or intent of the communicator. This is precisely what the arbitrator did.

Thus, with respect to the content of the literature circulated by Pacheco, the arbitrator found that Pacheco "grossly exaggerated, with the intent to deliberately mislead [sic] the safety record of the plant in 1977." In support of this conclusion, the arbitrator considered the leaflet which stated, inter alia:

> Pioneer Finishing is a dangerous place to work ... in 1977 alone, there were 28 serious accidents resulting in 2,248 hours of lost time and wages! Which of us will be victims of these crippling accidents daily because of holes in the floor, falling lights, defective trucks and machinery, etc. [emphasis supplied].

He also considered the facts as to the actual safety record of the plant. These undisputed facts establish that of the 28 accidents in 1977, 19 resulted in no lost time. Of the 9 accidents which resulted in lost time, there was no evidence that they were serious enough to constitute

"crippling accidents". Pacheco knew from the very same document from which he obtained the figure of 28 total occupational injuries and illnesses that there were not 28 serious accidents but only 9 accidents involving any lost time! (A. 30a-31a). Further as found by the arbitrator, ". . . there were only four accidents having lost time of more than 7 days." Moreover, had Pacheco inquired, he would have discovered that of these four accidents, one was a result of an injured back, a second was a result of a pulled muscle, and a third was the result of a skin rash. These three accidents caused 305 out of the 333 lost work days in 1977. (A. 31a).

Thus, the facts, as found by the arbitrator, establish that the contents of the leaflet were untrue and Pacheco published these false statements "with the intent to deliberately mislead [sic]."[18] [Emphasis added]. These

[18] The court below simply ignored the arbitrator's findings. The Board acknowledged that the accidents were neither "serious" nor "crippling" but observed that Pacheco did not intend that fellow employees would interpret his

findings made by the arbitrator are indistinguishable from the reckless or knowing falsity test of Linn. Nor does the Court's opinion in Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin, 418 U. S. 264 (1974) mandate a contrary conclusion as found by the court below. In Letter Carriers v. Austin, this Court found that only one factual statement had been made, that the employees were "scabs." This factual statement was found to be true. This Court held that before the test of reckless or knowing falsity can be met, there must be a false statement of fact. However, the Court went on to observe that the leaflet would have lost its protection if "used in such a way as to convey a false representation of fact." Id. at 286.

The arbitrator found that false statements of fact had been made in the leaflet distributed by Pacheco and that Pacheco distributed these statements with

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18 (Cont'd.)
statements as "representations of fact." The Board found that the statements were mere "rhetorical hyperbole," thereby substituting their judgment on a factual issue for that of the arbitrator.

the "intent" to mislead. There can be little doubt that such factual findings of necessity dispose of the statutory issue, whether the leaflet is protected under the Act. Springfield Library & Museum Association, supra; Linn v. United Plant Guard Workers, supra. Moreover, such a finding perforce requires a determination that the decision of the arbitrator is not clearly repugnant to the Act [19]. NLRB v. Pincus Brothers, supra.

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[19] The arbitrator also determined that Pacheco's conduct was intended to undermine the collective bargaining relationship between the Company and the union, and that Pacheco's distribution of the literature while acting as a Union representative was unprotected. These factual findings are not clearly repugnant to the Act, either. Emporium Capwell v. Western Addition, supra; NLRB v, Pincus Brothers, supra.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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